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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Joe Cuen,

10 Petitioner,

11 v.

12 Charles Ryan, et al.,

13 Respondents.
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No. CV-17-02194-PHX-JAT

ORDER

15 Pending before the Court is the Report and Recommendation (R&R) from the
16 Magistrate Judge recommending that the Petition in this case be dismissed with
17 prejudice. (Doc. 15). Petitioner has objected to the R&R. (Doc. 16).

18 This Court “may accept, reject, or modify, in whole or in part, the findings or
19 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). It is “clear that
20 the district judge must review the magistrate judge’s findings and recommendations *de*
21 *novo if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d
22 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in original); *Schmidt v. Johnstone*, 263
23 F.Supp.2d 1219, 1226 (D. Ariz. 2003) (“Following *Reyna-Tapia*, this Court concludes
24 that *de novo* review of factual and legal issues is required if objections are made, ‘but not
25 otherwise.’”); *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d
26 1027, 1032 (9th Cir. 2009) (the district court “must review *de novo* the portions of the
27 [Magistrate Judge’s] recommendations to which the parties object.”). District courts are
28 not required to conduct “any review at all . . . of *any issue* that is not the subject of an

1 objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1985) (emphasis added); *see also* 28
2 U.S.C. § 636(b)(1) (“the court shall make a *de novo* determination of those portions of
3 the [report and recommendation] to which objection is made.”).

4 In this case, Petitioner challenges a conviction from 1986, for which he has
5 already completed his sentence. (Doc. 15 at 1). As the R&R notes, as a general rule, a
6 Petitioner cannot challenge a conviction when the sentence has already been served. (*Id.*
7 at 2). However, there is an exception to this rule when: 1) the conviction is used to
8 enhance a subsequent sentence; and, 2) the prior conviction was obtained without
9 appointment of counsel. (*Id.* at 1-2). The Supreme Court has also stated that there
10 “might” be another exception when: 1) the conviction is used to enhance a subsequent
11 sentence; and, 2) the current habeas petition challenging the prior sentence is effectively
12 the first and only forum available to review the prior sentence. (*Id.*). The Supreme Court
13 further defined first and only forum to include when: 1) the state court refused to rule on
14 a constitutional claim that was properly presented to it, without justification; or 2) the
15 petitioner has compelling evidence of his innocence that could not have been uncovered
16 in a timely manner. (*Id.* at 2-3). Although the Supreme Court stated this “might” be an
17 exception, the R&R notes that the Ninth Circuit Court of Appeals has held that this is an
18 exception. (*Id.* at 3).

19 Here, Petitioner’s 2011 conviction was enhanced by his 1986 sentence. (*Id.* at 2).
20 However, the 1986 conviction was not obtained without counsel. Thus, the exception
21 recognized by the Supreme Court that allows a challenge to a served sentence does not
22 apply. Further, in his Petition, Petitioner presents no evidence that he is innocent, and
23 makes no argument that the state court refused, without justification, to rule on a
24 constitutional claim properly presented to it. Thus, the exception recognized by the Ninth
25 Circuit that allows a challenge to a served sentence also does not apply.

26 Petitioner’s objections do not change this result. In his objections, Petitioner
27 disputes whether he should have been required to register as a sex offender, and
28 complains about his 2004, 2005, 2011 and 2015 cases. (Doc. 16 at 1-3). None of these

1 arguments impacts the 1986 conviction, which is the subject of this Petition.
2 Accordingly, the objections will be overruled.

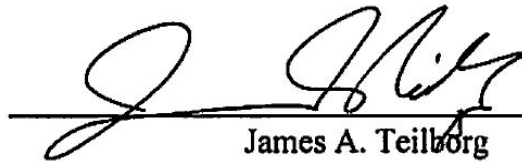
3 Based on the foregoing,

4 **IT IS ORDERED** that the Report and Recommendation (Doc. 15) is accepted; the
5 objections (Doc. 16) are overruled, the Petition is denied and dismissed with prejudice
6 and the Clerk of the Court shall enter judgment accordingly.

7 **IT IS FURTHER ORDERED** that, in the event Petitioner files an appeal, the
8 Court denies issuance of a certificate of appealability because dismissal of the petition is
9 based on a plain procedural bar and jurists of reason would not find this Court's
10 procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

11 Dated this 11th day of June, 2018.

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James A. Teilborg
Senior United States District Judge